Supreme Court, U. S.
FILED
OCT 3 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-508

GTE SYLVANIA, INCORPORATED,
RCA CORPORATION,
THE MAGNAVOX COMPANY,
ZENITH RADIO CORPORATION,
MOTOROLA, INC.,
WARWICK ELECTRONICS, INC.,
AERONUTRONIC FORD CORPORATION,
MATSUSHITA ELECTRIC CORPORATION OF AMERICA,
SHARP ELECTRONIC CORPORATION,
TOSHIBA-AMERICA, INC.,
GENERAL ELECTRIC COMPANY,
ADMIRAL CORPORATION,

Petitioners,

v.

CONSUMERS UNION OF THE UNITED STATES, INC.,
PUBLIC CITIZEN'S HEALTH RESEARCH GROUP,
CONSUMER PRODUCT SAFETY COMMISSION,
RICHARD O. SIMPSON,
BARBARA H. FRANKLIN,
LAWRENCE KUSHNER,
CONSTANCE NEWMAN,
R. DAVID PITTLE,
SADYE DUNN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on July 5, 1977.

OPINIONS BELOW.

The opinion of the Court of Appeals (1a-16a)[1] and the orders denying rehearing (71a-73a) and rehearing en banc (74a) are not yet reported. The opinion of the United States District Court for the District of Columbia (75a-86a) is reported at 400 F. Supp. 848 (D. D. C. 1975).

JURISDICTION.

The judgment of the Court of Appeals was entered on July 5, 1977. Timely petitions for rehearing were denied on August 25, 1977, and this petition for certiorari is being filed within 90 days of that date. On September 9, 1977, the Court of Appeals granted a stay of its mandate to and including October 3, 1977 pending the filing of petitions for certiorari.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). Jurisdiction in the District Court was based on the Freedom of Information Act, 5 U. S. C. § 552.

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1. ("a") denotes a reference to the Appendix to this Petition which is being submitted under separate cover because of its length.

QUESTIONS PRESENTED.

The decision of which review is sought arises out of an action instituted in the United States District Court for the District of Columbia under the Freedom of Information Act, 5 U. S. C. § 552 ("FOIA"), to compel a governmental agency to release certain information which the agency wishes to release and has determined and agreed to release but which it has refrained from releasing solely because it has been restrained and preliminarily enjoined from doing so in separate litigation previously instituted against it in the United States District Court for the District of Delaware by the suppliers of the information. The questions presented are:

1. Does an FOIA action to compel release of information present the constitutionally required "case" or "controversy" where the plaintiffs and the governmental agency against which the action is brought desire precisely the same result, namely release to the plaintiffs of the information which the plaintiffs seek, and where the defendant agency has not released the information solely because it has been restrained and preliminarily enjoined from doing so in on-going litigation in another federal court?

a. Under the foregoing circumstances may a court of appeals circumvent the case or controversy requirement by perceiving a supposed disagreement between the parties as to whether the outstanding preliminary injunction of a district court in another circuit prohibiting the agency from releasing the information precludes the agency from providing the information to the plaintiffs?

b. Under the foregoing circumstances may a court of appeals create a justiciable case or controversy by making a *sua sponte* determination that the defendant agency does not actually desire to release the information because, in the view of the court of appeals,—a view based on rank speculation without foundation in the record, without hearing or argument, and contrary to fact—the agency had been less than vigilant in espousing its asserted position in favor of disclosure in the litigation in the other federal court?

2. Is a court of appeals free to require a district court in its own circuit to proceed to determine whether an agency should be compelled to release certain information under the FOIA when a district court in another circuit has preliminarily enjoined the agency from releasing the information, when a final determination of the matter in the other district court is imminent, and when the parties seeking the information have had and continue to have ample opportunity to intervene or otherwise participate in the proceedings in the other district court?

3. Under the circumstances described in the second question, is the court of appeals free to deprive the district court in its own circuit of the inherent discretion to stay the proceedings before it pending resolution of the proceedings in the other district court?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Section 2 of Article III of the United States Constitution provides in relevant part as follows:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . to Controversies to which the United States shall be a Party;—to Controversies between two or more States; —between a State and Citizens of another State;— between Citizens of different States . . ."

The Freedom of Information Act, 5 U. S. C. § 552, provides in relevant part as follows:

> "(a)(3) . . . each agency, upon any request for records which (A) reasonably describes such records and (B) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.
>
> . . .
>
> "(a)(4)(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. . . ."

STATEMENT.

This petition seeks review of a decision of the United States Court of Appeals for the District of Columbia Circuit (opinion by Wright, J. for a panel consisting of himself and Bazelon, C. J. and Robinson, J.) reversing the dismissal for lack of a justiciable case or controversy of an action brought under the Freedom of Information Act ("FOIA") to compel a governmental agency to release certain information. The United States District Court for the District of Columbia ("the District of Columbia Court") (opinion by Richey, J.) had dismissed the action on the ground that there was no genuine dispute between the plaintiffs and the governmental agency since both parties desired precisely the same result—*i.e.*, release of the information—and the only reason the agency had not released the information was because of outstanding orders entered in separate litigation instituted against the agency by the suppliers of the information restraining and enjoining it from releasing the information.

The reversal of this decision by the Court of Appeals flies in the face of cases in which this Court has refused to permit the maintenance of suits where, in the words of one recent case, the parties "desire precisely the same result." **Moore v. Charlotte-Mecklenburg Board of Education,** 402 U. S. 47, 48 (1971). The Court of Appeals attempted to circumvent these cases by perceiving a supposed disagreement between the plaintiffs and the agency as to whether the orders restraining and enjoining the agency from releasing the information precluded the agency from providing the information to the plaintiffs. The Court also challenged the sincerity of the agency's asserted desire to release the information the plaintiffs sought and determined, without the benefit of hearing or argument, that the agency had been "less than vigilant" in

espousing the "pro-disclosure" position in the other litigation, which was proceeding in the United States District Court for the District of Delaware ("the Delaware Court"). These rulings of the Court of Appeals clearly do violence to the case or controversy requirement in the United States Constitution as it has been interpreted by this Court and, if allowed to stand, will open the door to precisely the type of contrived lawsuits which the case or controversy requirement was designed to prevent.

Also of critical importance to this Court are the questions raised by the Court of Appeals' insistence that the District of Columbia Court proceed with a prompt ruling on the merits of the case notwithstanding the preliminary injunction entered by the Delaware Court and the imminence of a final determination by that Court as to whether the injunction should be made permanent. In its original opinion the Court of Appeals justified this action by determining *sua sponte* first, that the Delaware litigation had been abandoned or terminated and that the preliminary injunction was "dead" and second, that the injunction could not be given preemptive effect because the pro-disclosure position had not been adequately represented in the Delaware Court, since no private party requesting the information had participated in the proceedings in that Court and in the Court of Appeals' view the agency had not fought sufficiently hard against entry of the injunction. Although the parties who participated in the Delaware litigation advised the Court of Appeals in petitions for rehearing that its views of the status of that litigation and the manner in which the litigation was conducted were completely erroneous, the Court of Appeals nevertheless continued blithely to ignore the preliminary injunction and on-going proceedings in the Delaware Court and deliberately set the District of Columbia Court on a collision course with the Delaware Court. Such behavior represents a sharp departure from the usual and accepted conduct of one federal court when confronted with an outstanding injunction on the merits issued by another federal court on the very same subject matter and should not be countenanced by this Court.

This proceeding concerns certain "television-related" accident information which petitioners, twelve manufacturers of television receivers, furnished to the Consumer Product Safety Commission ("the CPSC") in 1974 in response to special orders and subpoenas issued by the CPSC. Upon being advised in April of 1975 that, notwithstanding petitioners' claims of confidentiality of their submissions, the CPSC had made a final determination to release the information to the public, petitioners immediately brought suit in various federal judicial districts against the CPSC to enjoin the threatened disclosure on the grounds that release was barred by exemptions to the FOIA (5 U. S. C. § 552(b)) and by provisions of the Consumer Product Safety Act (15 U. S. C. § 2055) and the Criminal Code (18 U. S. C. § 1905). Most of the actions were commenced in the District of Delaware and, at the request of the CPSC, the actions filed in other districts were transferred to the District of Delaware.[2]

Temporary restraining orders prohibiting disclosure of the information *pendente lite* were entered shortly after commencement of the actions instituted by petitioners.

2. The following manufacturers filed actions in the District of Delaware: GTE Sylvania (C. A. No. 75-104), RCA (C. A. No. 75-108), Magnavox (C. A. No. 75-112), Zenith (C. A. No. 75-113), Motorola (C. A. No. 75-114), Warwick (C. A. No. 75-115), and Aeronutronic Ford (C. A. No. 75-116). Matsushita (C. A. No. 75-2040), Sharp (C. A. No. 75-2049) and Toshiba (C. A. No. 75-2050) filed actions in the Southern District of New York, General Electric (75-CV-189) in the Northern District of New York, and Admiral (C. A. No. 75-531) in the Western District of Pennsylvania.

Then, on October 23, 1975, after extensive briefing and argument, a preliminary injunction (124a-126a) was entered by Chief Judge Latchum of the Delaware Court enjoining the CPSC from disclosing the information "in any manner" pending further order of the Court. **GTE Sylvania, Inc., et al. v. Consumer Product Safety Commission,** 404 F. Supp. 352 (D. Del. 1975) (87a-123a). On the basis of the extensive factual record before him, Judge Latchum held that the manufacturers had made a substantial showing that Section 6(b) of the Consumer Product Safety Act, 15 U. S. C. § 2055(b),[3] prohibited disclosure of the information since the CPSC had failed to take reasonable steps to assure the accuracy of the information and because it appeared that the information would not assist consumers in evaluating the relative safety of television sets—the avowed reason for disclosure given by the CPSC and one of the purposes of the Consumer Product Safety Act—and would in fact be misleading to the public.

Subsequent to the commencement of the actions brought by petitioners and the entry of temporary restraining orders in those actions, Consumers Union of the United States, Inc. and Public Citizen's Health Research Group (collectively "plaintiffs") instituted the instant action in the District of Columbia.[4] In this action plaintiffs sought

3. This provision reads in relevant part:

". . . The Commission shall take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identify of such manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances, and reasonably related to effectuating the purposes of this [Act] . . . ."

4. Plaintiffs chose to institute their own action in the District of Columbia Court rather than to intervene in the on-going proceedings in the Delaware Court (131a n. 9), even though they were fully aware of those proceedings and their complaint made specific reference to those proceedings.

under the FOIA to compel the CPSC, its Chairman, its other Commissioners, and its Secretary ("the CPSC defendants") to release the accident information which had been submitted to the CPSC by the manufacturers and which was the subject of the proceedings in the Delaware Court.[5] While agreeing with plaintiffs that the data should be released to them, the CPSC defendants had refrained from releasing the information because of the restraining orders entered in the Delaware litigation. Jurisdiction of the District of Columbia Court was invoked under the FOIA, 5 U. S. C. § 552.[6]

The defendants immediately moved to dismiss or stay the District of Columbia action on the grounds that (1) since plaintiffs and the CPSC defendants were in agreement that the information should be released to plaintiffs, the parties were not true adversaries and, accordingly, the constitutionally required case or controversy did not exist, and (2) even if there were a case or controversy the existence of the restraining orders entered by the Delaware Court and the on-going injunctive proceedings there called for the District of Columbia Court to exercise its discretion to stay the action pending resolution of the Delaware litigation. In ruling on these motions, Judge Richey of the District of Columbia Court held that there was no case or controversy and dismissed the action without considering the second argument advanced by the

5. The petitioning manufacturers were joined as defendants in the District of Columbia action, but no relief was sought against them.

6. Plaintiffs also asserted as jurisdictional bases for their suit the Declaratory Judgment Act, 28 U. S. C. §§ 2201-2202, and the Administrative Procedure Act ("APA"), 5 U. S. C. § 702. Clearly these statutes provide no independent basis for jurisdiction. **Skelly Oil Co. v. Phillips Petroleum Co.,** 339 U. S. 667, 671-672 (1950); **Califano v. Sanders,** 430 U. S. 99, 104-107 (1977).

defendants.[7] **Consumers Union of United States, Inc. v. Consumer Product Safety Commission, et al.**, 400 F. Supp. 348 (D. D. C. 1975) (75a-86a).[8]

The Court of Appeals reversed, holding that there was a case or controversy and that on remand Judge Richey should proceed promptly to determine "quite simply, whether or not the documents should in fact be disclosed" (15a). **Consumers Union of United States, Inc., et al. v. Consumer Product Safety Commission, et al.**, No. 75-2059 (D. C. Cir. July 5, 1977) (1a-16a). The Court of Appeals perceived the necessary case or controversy to exist in (1) a supposed disagreement between plaintiffs and the CPSC over whether the oustanding preliminary injunction entered by Chief Judge Latchum "unequivocally preclude[d]" the CPSC from providing plaintiffs with the information in question (9a) and (2) the Court of Appeals' suspicion that the CPSC did not really want to release the information because, in the Court's view, the CPSC's conduct of the Delaware litigation was "not easily reconcilable with its ostensible acceptance of [plaintiffs'] argument that the requested documents should be disclosed" (10a). The Court of Appeals then brushed aside the preexisting Delaware proceedings and Chief Judge Latchum's preliminary injunction by cavalierly concluding that the Delaware litigation had "run its course" and had in effect been terminated (13a) and that the preliminary injunction was "dead"

7. The Court of Appeals in its per curiam opinion denying rehearing twice incorrectly referred to the manufacturers as "intervenors" (72a). In fact, the manufacturers were named as defendants in the District of Columbia action. Judge Richey dismissed the action as to the manufacturer defendants on the ground that no relief was or could be sought against these defendants under the FOIA or the APA (83a).

8. Even after the District of Columbia case was dismissed, plaintiffs made no effort to intervene or participate in any way in the proceedings in the Delaware Court, despite numerous opportunities to do so (133a).

(14a).[9] The Court further held that the injunction could not be given preemptive effect in any event because no private party requesting disclosure of the information had participated in the Delaware proceedings and, given what the Court viewed as the CPSC's "peculiar approach to [those] proceedings, therefore, the pro-disclosure position [had been] all but unrepresented" (12a).

This disdainful treatment of the Delaware proceedings stemmed from the Court of Appeals' erroneous impression of matters not of record and not argued in the briefs of the parties. All of the defendants in the District of Columbia action, including the CPSC, filed strong petitions for rehearing, pointing out that the preliminary injunction entered by Chief Judge Latchum was crystal clear[10] and that there was no dispute between plaintiffs

9. The asserted basis for this statement was that the Delaware District Court had entered an order (127a) "closing out" the case, an order which indicated to the Court of Appeals "that, although the reverse FOIA action was not dismissed in form, it was dismissed in fact, and by acquiescence of the parties the matter was dropped" (14a).

10. The injunction provided in pertinent part as follows (124a):

"On the basis of findings of fact and conclusions of law set forth in the Court's opinion of this date entered in these cases, it is

"ORDERED

"1. That pending final hearing and determination by the Court or until further order of the Court, the defendant, Consumer Product Safety Commission ('Commission'), its members, agents, officers, employees and all other persons in active concert and participation with them are hereby enjoined from disclosing to the public in any manner:

"(a) Any data submitted by plaintiffs to the defendant Commission in response to a special order issued May 13, 1974;

"(b) Any data submitted by plaintiffs to the Commission in response to a subpoena duces tecum issued by the Commission on July 26, 1974; and

"(c) Any report, extraction, computer analysis, or other document or documents purporting to be a summary

and the CPSC over whether it precluded the CPSC from providing plaintiffs with the information they requested, that the CPSC had vehemently and in good faith advocated in the Delaware proceedings that the information should be released, that the Delaware cases and injunction were not "dead" but were very much alive,[11] and that in fact

10. (Cont'd.)
or compilation of the data previously supplied to the Commission described in sub-paragraphs (a) and (b) above. . . ."

11. On this point, the petitions for rehearing noted that by its terms the Delaware preliminary injunction was to remain in effect "until further order of the Court" (124a) and fully spelled out the history of the "close-out" order upon which the Court of Appeals placed its principal reliance (13a-14a). On August 2, 1976, Chief Judge Latchum advised the parties by letter that unless they intended to request a hearing for permanent injunctive relief, he intended to close the Delaware cases *for statistical purposes only*. The manufacturers responded to Judge Latchum by letters stating that they had no objection to the cases being closed for statistical purposes provided that it was understood by all concerned that the preliminary injunction remained in effect. The CPSC, on the other hand, requested that the cases be maintained as pending cases, advising Judge Latchum that it intended "to resist the entry of permanent injunctive relief." The CPSC did, however, request that further discovery and a further hearing be postponed until a decision issued in a case pending in the Western District of New York, which the CPSC thought might ultimately resolve issues pertinent to the Delaware cases (48a).

Judge Latchum then issued a "minute order" (127a) on August 20, 1976 instructing the clerk "to submit a JS-6 form to the Administrative Office and close these cases for statistical purposes." The minute order provided:

> "Nothing contained herein shall be considered a dismissal or disposition of the matter and should further proceedings become necessary or desirable, any party may initiate in the same manner as if this minute order had not been entered."

It was clear to all of the parties in the Delaware cases that the preliminary injunction remained in effect even after entry of the minute order and it was equally clear to Judge Latchum. Indeed, at a conference held on July 11, 1977, Judge Latchum specifically stated that the minute order "didn't dispose of the case" and "didn't dismiss the action" and that "the preliminary injunction . . . remains outstanding" (49a).

Judge Latchum had set the matter down for a prompt hearing to determine whether the preliminary injunction should be made permanent (29a-65a). Plaintiffs not only did not dispute these facts but conceded in their response to the petitions for rehearing that the Court of Appeals' remand order should be modified to give Judge Richey discretion to proceed in some manner other than on the merits (69a-70a).

The Court of Appeals nevertheless denied the petitions for rehearing on August 25, 1977 (71a), refusing even to modify the remand order to give the District of Columbia Court discretion to consider a stay of its proceedings pending resolution of the Delaware litigation and making plain its determination to ride roughshod over the on-going Delaware proceedings.[12]

12. Since the denial of rehearing by the Court of Appeals, the Delaware litigation has continued past the discovery and pretrial motion stages to the point where it is now ripe for disposition on the merits. The CPSC's motion to transfer the Delaware cases to the District of Columbia was denied on September 15, 1977, at which time a briefing schedule on cross-motions for summary judgment was ordered by Chief Judge Latchum. **GTE Sylvania, Inc., et al. v. Consumer Product Safety Commission,** No. 75-104 (D. Del. Sept. 15, 1977) (128a-137a). Argument on these motions will be heard on October 28, 1977.

REASONS FOR GRANTING THE WRIT.

The decision of the Court of Appeals raises important questions concerning an issue basic to every lawsuit instituted in a federal district court—that is, the existence of the constitutionally requisite case or controversy between the parties—and other fundamental questions concerning the relationship between the various courts comprising our federal system and the deference one federal court should accord a preliminary injunction and on-going proceedings of another federal court. These questions are presented in the context of a case in which plaintiffs seek to have a federal district court direct a governmental agency to release certain information which the agency has been preliminarily enjoined from releasing by a federal district court in another circuit in litigation instituted by the persons who supplied the information to the agency. The questions are highly significant and in view of the growing volume of FOIA litigation throughout the country are very likely to recur. Review of these important questions by this Court is needed in order that district courts may have guidance for the problems which will soon confront them.

The decision of the Court of Appeals for the District of Columbia Circuit in this case does violence to the case or controversy requirement of Article III of the Constitution by contriving a disagreement between the parties over the meaning of a crystal clear injunction issued by a district court in another circuit and by unfairly and inaccurately impugning the motives and integrity of the CPSC and the government attorneys representing it. It will unnecessarily expose the defendants to duplicative litigation and foment conflict between the District of Columbia Court and the Delaware Court by requiring the former to redetermine what the latter has already preliminarily determined and is in the process of finally determining. Indeed, by asserting, contrary to all reason, that the District of Columbia Court not only may but *must* proceed to hear the merits of the case instituted by plaintiffs, the Court of Appeals has attempted to usurp the jurisdiction of the Delaware Court—a court in another circuit over which it does not have any power of appellate review—over an on-going litigation on the same subject in which plaintiffs have consistently refused to participate.

We believe the decision of the Court of Appeals raises issues of paramount importance to the orderly administration of justice and the harmonious interrelationship of one federal court with another that cry out for review and direction by this Court. The errors of the Court of Appeals are so egregious even as to justify summary reversal. Such action would in itself provide significant guidance to the lower federal courts.

1. It cannot be doubted that as a court established pursuant to Article III of the Constitution, the District of Columbia Court has jurisdiction only over actual "cases" and "controversies." *See* **United Public Workers v. Mitchell,** 330 U. S. 75, 89 (1947); **Aetna Life Insurance Co. v. Haworth,** 300 U. S. 227 (1937); **Muskrat v. United States,** 219 U. S. 346, 356 (1911). There must be a "substantial controversy, between parties having adverse legal interests." **Maryland Casualty Co. v. Pacific Coal & Oil Co.,** 312 U. S. 270, 273 (1941). In the words of this Court's most recent case in the area, where parties "desire precisely the same result. . . . [t]here is . . . no case or controversy within the meaning of Article III of the Constitution." **Moore v. Charlotte-Mecklenburg Board of Education,** 402 U. S. 47, 48 (1971).

In the instant case, the Court of Appeals held that a justiciable case or controversy exists between plaintiffs, who seek release of certain information under the FOIA,

and the CPSC, the governmental agency from whom release is sought, notwithstanding the fact that the CPSC wants to release the information to plaintiffs and has made a formal determination to do so. The CPSC desires—and has always desired—precisely the same result as plaintiffs, and the only reason the information has not been released to plaintiffs is because of the restraining orders and the preliminary injunction entered in the Delaware litigation.[13] Thus on its face the decision of the Court of Appeals does violence to the constitutional case or controversy requirement.[14]

If the decision of the Court of Appeals is allowed to stand, any party which has been enjoined from doing something it wishes to do by one federal court will be able to try to be released from the injunction by arranging for another interested party to bring suit in a different federal court to have the first party ordered to do what it actually desires but cannot do without violating the injunction issued in the first court. The decision will also enable any individual who does not like a particular court's order in a litigation in which he has an interest to ignore that order and to try to bypass the order by starting an action in

13. Indeed, as Judge Richey noted in dismissing the District of Columbia action (82a n. 14), the CPSC made this very representation in the District of Columbia Court, stating in paragraph 13 of its answer to the complaint that "disclosure will be made as soon as the [CPSC] defendants are not enjoined from doing so."

14. As the District of Columbia Court correctly held (83a-84a) in dismissing this action, the inclusion of the suppliers of the information (the petitioning manufacturers) as parties defendant in the District of Columbia case does not serve to create a case or controversy. The complaint did not seek any relief from the suppliers and the only relief permissible under the FOIA or the APA, the claimed jurisdictional bases of this action, is relief against governmental agencies. *See* 5 U. S. C. § 552(a)(4)(B); **Lombardo v. Handler,** 397 F. Supp. 792, 802 (D. D. C. 1975), *aff'd,* 546 F. 2d 1043 (D. C. Cir. 1976); 5 U. S. C. § 702; **Thomas v. DeVilbiss,** 408 F. Supp. 1357, 1360 (D. Ariz. 1973).

another court he considers to be more favorably disposed to his position. The decision of the Court of Appeals thus will have a wide-ranging effect on litigation in the federal courts which cannot be reconciled with the language or intent of Article III. Moreover, as we discuss below, the justifications offered by the Court of Appeals for its case or controversy holding demonstrate such specious reasoning and lack of regard for the Delaware Court that the decision will set a dangerous precedent which other courts may be tempted to follow absent review and correction of the decision by this Court.

a. The Court of Appeals attempted to distinguish the cases which would ordinarily require dismissal here by contriving a disagreement between plaintiffs and the CPSC defendants as to whether the Delaware preliminary injunction "precluded" or "absolved" the CPSC from providing plaintiffs with the information they sought (9a). But not one word in plaintiffs' complaint or briefs questioned the meaning of the orders entered in the Delaware litigation or their binding effect on the CPSC. There was no controversy as to whether the restraining orders or the preliminary injunction prevented the CPSC from releasing the accident information to plaintiffs. Clearly they did.[15]

Indeed, the remand order (15a) itself demonstrates the speciousness of the alleged "controversy" between the parties found by the Court of Appeals. The remand order does not direct the District of Columbia Court to determine whether the Delaware injunction prevents the CPSC from releasing the information to plaintiffs, but rather mandates that Court to resolve the underlying merits of the case before it, to determine whether the information should be released to plaintiffs, and, in effect, to determine whether the Delaware injunction should have issued at all.

15. See note 10 *supra* for the language of the injunction.

There is concededly no disagreement between plaintiffs and the CPSC as to the answer to the question which the District of Columbia Court is directed to resolve. They agree that the information should be released, that disclosure is called for under the FOIA and that disclosure is not barred by any of the exemptions to the FOIA or the provisions of the Consumer Product Safety Act or the Criminal Code. The Court of Appeals' circumvention of the case or controversy requirement in this manner could not be clearer and cannot be allowed to stand.

b. Equally disturbing and without precedent is the Court of Appeals' unwarranted impugning of the motives of the CPSC and its defense of the Delaware cases as exemplified by the Court's statement that the CPSC's conduct of the Delaware litigation was "not easily reconcilable with its ostensible acceptance of [plaintiffs'] argument that the requested documents should be disclosed" (10a). This virtual accusation of bad faith on the part of the CPSC and its attorneys by the Court of Appeals was made without the benefit of briefs or oral argument on the subject and was based on inferences which, in addition to having no basis in the record, are clearly wrong, as demonstrated by Chief Judge Latchum's recent opinion describing the Delaware cases as "hotly contested" (128a).[16]

16. The petitions for rehearing filed with the Court of Appeals, particularly that of the CPSC, show how totally unjustified the Court of Appeals was in its attack on the CPSC's handling of the Delaware litigation. Of particular note is the Court of Appeals' completely baseless challenge of the CPSC's motives in failing to oppose the temporary restraining orders and its decision to withdraw its appeal from the preliminary injunction. The need for TRO's to prevent the whole matter from becoming moot was so obvious that the entry of such orders by the Delaware Court was certain, and therefore opposition would have plainly been fruitless. Moreover, the CPSC felt it needed more time fully to brief its position before any preliminary injunction hearing (62a n. 12). The decision to withdraw the interlocutory appeal was made by the

Moreover, the Court of Appeals' extraordinary reaching beyond matters of record to find a justiciable controversy here was completely out of keeping with its role as a court of appellate rather than original jurisdiction. As the Court apparently recognized in some small part (11a n. 27), questionable or even clearly incorrect civil litigation strategy is simply not a matter for consideration by an appellate court. The self-admitted desire of the CPSC defendants to release the accident information to plaintiffs absent the Delaware injunction is itself sufficient to demonstrate a lack of adverseness between the parties. Even if the Court of Appeals believed that the CPSC's conduct of the Delaware litigation somehow brought into question the sincerity of its stated desire to release the information to plaintiffs, it was clearly inappropriate and in excess of the Court's authority to base its holding upon that belief—thus going far beyond the mere taking of judicial notice of proceedings and positions taken by the parties in other litigation—without affording the parties an opportunity to be heard in a federal district court with the power to hold a hearing on this limited question.

2. By ordering the District of Columbia Court to proceed to determine whether the accident information should be disclosed, the Court of Appeals completely disregarded the outstanding preliminary injunction issued by the Delaware Court prohibiting disclosure of the in-

16. (Cont'd.)
Solicitor General, who concluded that the appeal would clearly be futile (63a). Nor is the failure of the CPSC to press for a prompt final hearing in the Delaware litigation any basis for challenging the bona fides of its expressed desire to release the information. The fact is that the CPSC justifiably concluded that prompt final hearing would simply result in the Delaware injunction being made final and that it stood a better chance of prevailing if a hoped-for favorable ruling in a case pending in the Western District of New York were handed down first (64a).

formation and the imminence of proceedings in that Court to determine whether the injunction should be made permanent. The decision of the Court of Appeals has thus set the District of Columbia Court on a potential collision course with the Delaware Court. Such a result is totally unnecessary and completely inconsistent with fundamental principles of comity and the orderly administration of justice.

In general, one federal district court should not interfere with the proceedings of another or attempt to reexamine matters already considered and resolved there. *See* **Hilton Hotels Corp. v. Weaver,** 325 F. 2d 1010 (D. C. Cir. 1963) *cert. denied,* 376 U. S. 951 (1964). "[W]here the jurisdiction of a federal district court has first attached, the right cannot be arrested or taken away by proceedings in another federal district court." **O'Hare International Bank v. Lambert,** 459 F. 2d 328, 331 (10th Cir. 1972). "[A] party who first brings an issue into a court of competent jurisdiction should be free from the vexation of concurrent litigation over the same subject matter." **Martin v. Graybar Electric Co.,** 266 F. 2d 202, 204 (9th Cir. 1959). "Ordinarily, the court first acquiring jurisdiction of a controversy should be allowed to proceed with it without interference from other courts under suits subsequently instituted." **Carbon and Carbide C. Corp. v. United States I. Chemicals,** 140 F. 2d 47, 49 (4th Cir. 1944).

Here, the Delaware Court was the first to acquire jurisdiction over the subject matter of the controversy, and as Chief Judge Latchum has recently noted (132a), not only has he entered a preliminary injunction but the cases before him have now proceeded beyond the discovery stage, a voluminous record relating to the merits has been developed with which he is familiar, and final disposition of the litigation is imminent. In contrast, the District of

Columbia case is at a very preliminary stage with jurisdictional motions still pending and answers to the complaint not even filed by most of the defendants. Assuming *arguendo* the existence of a case or controversy, principles of comity and the orderly administration of justice required the Court of Appeals to remand the case to the District of Columbia Court with directions to stay the proceedings pending resolution of the Delaware litigation.

Although it voiced belief in the need for "conservation of judicial resources and comprehensive disposition of litigation" (13a), the Court of Appeals seemed untroubled by the fact that its order required the District of Columbia Court to proceed on a course which would result at best in its duplicating, and at worst directly conflicting with, the proceedings which had occurred in the Delaware Court and the final resolution of the litigation in that Court, which would clearly have an impact on the District of Columbia litigation as well. The reasons given by the Court of Appeals for its lack of concern on this point were (1) its determination that the Delaware litigation had "run its course" and had been "dismissed in fact" and that the preliminary injunction was "dead" (13a-14a) and (2) its conclusion that the injunction could not be given preemptive effect because no private party seeking the information had participated in the Delaware proceedings and, in the Court of Appeals' view, the CPSC had not adequately represented the pro-disclosure position in the Delaware Court (15a). These rulings by the Court of Appeals were at once so erroneous and such an overextension of the Court's appellate powers that they alone justify certiorari review by this Court.

The improper characterization by the Court of Appeals of the Delaware litigation—again made *sua sponte* and without the benefit of briefs or oral argument on the

subject—lacked support in the record before the Court of Appeals. Moreover, the characterization had no basis in fact, as the parties to the Delaware litigation promptly informed the Court of Appeals in petitions for rehearing and as the Delaware Court itself quickly confirmed (49a). Even assuming the determination in the Court of Appeals' original opinion to have somehow been excusable, despite its undue intrusiveness into the affairs of another court, there can certainly be no excuse for the failure of the Court of Appeals to rectify its obvious error by granting rehearing or at least staying the proceedings below pending resolution of the Delaware litigation.

Nor can there be any merit in the second reason advanced by the Court of Appeals for its disregarding the existence of the Delaware injunction, namely the asserted lack of adequate representation of the pro-disclosure position in the Delaware Court. The CPSC is "hotly contesting" the manufacturers' contentions that the information should not be disclosed (128a), and plaintiffs have always known of and been free to participate in the Delaware proceedings if they felt the pro-disclosure position was not being set forth with sufficient force in that forum. The fact is that plaintiffs chose not to participate in the Delaware proceedings "for strategic reasons" (131a n. 9) and to limit their activity to the proceedings they initiated in the District of Columbia. This deliberate decision cannot provide a basis for ordering the District of Columbia Court to hear plaintiffs' claims notwithstanding the Delaware proceedings. If the Court of Appeal's ruling is permitted to stand, no individual with an interest in the outcome of a litigation would ever participate in that litigation because he could always institute a later suit of his own if the first suit were not resolved to his satisfaction.

3. Under the circumstances of this case, principles of comity and the orderly administration of justice demanded

that at the very least the Court of Appeals not impair the inherent discretion of the District of Columbia Court to stay the proceedings before it pending the imminent resolution of the litigation in the Delaware Court. The failure of the Court of Appeals to modify its remand order to restore this inherent discretion of the District of Columbia Court—as *all* parties, including plaintiffs, urged it should be modified—was clear error, especially in light of the differing postures of the District of Columbia and the Delaware cases and the fact that the final resolution of the Delaware litigation is so imminent (132a). The Court of Appeals' refusal to adopt this obviously indicated course of action can only be interpreted as further evidence of its total disregard for the authority of the Delaware Court. This deliberate flouting by the Court of Appeals of the jurisdiction of another federal court over which it has no authority cannot be countenanced by this Court.

CONCLUSION.

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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